

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO RENA PROPHET,

Defendant-Appellant.

UNPUBLISHED

August 26, 2008

No. 278184

Wayne Circuit court

LC No. 05-007237-01

Before: Schuette, P.J., Zahra and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(b) (penetration of victim between the age of 13 and 16), and two counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(b) (sexual contact with victim between the age of 13 and 16). This Court vacated defendant's original sentences, and remanded for resentencing. On remand, defendant was sentenced as a second habitual offender, MCL 769.10, to the same sentences previously imposed, 23 to 40 years for CSC I, and 15 to 22½ for CSC II. These sentences constituted a departure from the guidelines range. Defendant appeals as of right from the sentences imposed on remand. We vacate defendant's sentences and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that Offense Variable 19 was improperly rescored at 10 points on remand based on his having "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). During the first rape of the victim, defendant allegedly said, "if you scream or do anything I will kill you." Defendant argues that such a threat would be aimed at perpetrating the crime, and not at coercing a victim to refrain from reporting it. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

In *Endres*, the defendant objected to the scoring of OV 19 based on a threat to kill the victim that was made before criminal charges were brought. The *Endres* Court sanctioned the scoring because "[t]here was sufficient evidence to conclude that because of defendant's threats, his victim might have been dissuaded from coming forward with accusations and testimony, thus

preventing the discovery and prosecution of defendant's crimes." *Id.* at 421. Although defendant here did not specifically say that he would kill the victim if she reported the crime, the victim could have interpreted the phrase "do anything" to mean that, after the assault was completed, he would kill her if she told anyone. Defendant's attempt to distinguish *Endres* on grounds that his threat was only for purposes of completing the crime, but not dissuading the victim from reporting, is therefore not persuasive.

Defendant also argues that the 14-month upward departure from the guidelines range of 126 to 262 months was improper under MCL 769.34(3) because it was not supported by substantial and compelling reasons. Such reasons must be objective and verifiable, must keenly or irresistibly grab the court's attention, and must be of considerable worth in deciding the length of a sentence. They only exist in exceptional cases. The existence of a fact is reviewed for clear error, the determination that it is objective and verifiable is reviewed as a matter of law, and the determination that it constituted a substantial and compelling reason is reviewed for an abuse of discretion. See *People v Babcock*, 469 Mich 247, 258, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Here, the departure was in part based on the victim having been a child, defendant's violation of a position of authority and trust, and the psychological injury. "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). We conclude that the victim's youth and psychological injury were adequately taken into account since the crime defined the age of the victim and OV 4, MCL 777.34, was scored at ten points based on a serious psychological injury that would require professional treatment. However, the scoring of OV 10, MCL 777.40, to reflect exploitation based on age *or* domestic relationship *or* abuse of authority could properly be viewed as inadequate where not only one, but all three of these factors were present.

The trial court's remaining reasons for departure were not objective and verifiable. Although the victim's mother was supportive of defendant, there was no evidence that she reacted in this manner due to fear of or submission to defendant. Thus, it is not clear that defendant exercised control over the entire household. Moreover, substance abuse was simply never addressed and accordingly, its role or lack thereof is not verifiable. Since these two factors could not properly be relied upon to depart from the minimum guidelines range, the factors adequately taken into account by the guidelines could not be considered, and it is not clear whether the trial court would have departed from the guidelines absent these reasons, this case must therefore be remanded for resentencing. *Babcock*, *supra* at 260.

Defendant's sentences are vacated and this case is remanded for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens